

2001

State of Utah v. Michael Eugene Mitchell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

MICHAEL EUGENE MITCHELL,
Defendant/Appellant.

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Case No. 20010473-CA

Priority No. 2

OPENING BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT AND ORDER OF PROBATION
IN THE SEVENTH DISTRICT COURT
IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH
THE HONORABLE JUDGE LYLE R. ANDERSON, PRESIDING

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NOV - 9 2001

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure. See also Utah Code Ann, 78-2a-3(2)(e), conferring jurisdiction on this Court.

The Judgment and Order of Probation were signed by the Honorable Lyle Anderson on May 15th, 2001 and entered by the Clerk of the Court on May 17th, 2001. Sentencing was on May 14th, 2001. The Notice of Appeal was filed on June 4th, 2001, within 30 days of the entry of judgment. The Appeal is therefore timely pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

The issues presented for appeal are as follows:

- I. Did the arresting officer have sufficient reason to stop Defendant's vehicle?
- II. Whether Defendant's consent to search was valid because it was obtained by exploration of a prior illegality and was not voluntary.

Standard of Review: the Court reviews the factual findings underlying the trial courts decision to grant or deny a Motion to Suppress under a clearly erroneous standard. State v. Troyer, 910 P. 2d 1182, 1185 (Utah 1995).

The legal determination regarding reasonable suspicion made by the trial

courts are reviewed for correctness according no deference to the trial courts conclusion. State v. Yates, 918 P. 2d 136, 138 (Utah 1996); State v. Patefield, 927, P. 2d 655 (Utah App. 1996).

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 14, of the Constitution of Utah provides, in relevant part, that:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation describing the place to be searched, and the person or thing be seized.

Amendment Five of the Constitution of the United States provides, in relevant part, that:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Amendment Six of the Constitution of the United States provides, in relevant part, that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Amendment Fourteen of the Constitution of the United States provides, in relevant part, that:

No State shall...deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

Utah Code Section 76-1-501(1)(2)(a)(b) provides, in relevant part, that:

- (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.
- (2) As used in this part the words "element of the offense" mean:
 - (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;
 - (b) The culpable mental state required.

Utah Code Section 77-23-203(1)(2)(a)(b)(c) provides, in relevant part, that:

- (1) A search warrant shall not issue except on probable cause supported by oath or affirmation particularly describing the person or place to be searched and the person, property, or evidence to be seized.
- (2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is partly to the alleged illegal conduct, no search warrant shall issue except upon finding by the magistrate that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon the warrant such conditions that reasonably afford protection of the following interest of the person or entity in possession of such evidence:
 - (a) protection against unreasonable interference with normal business;
 - (b) protection against the loss or disclosure of protected confidential sources of information; or
 - (c) protection against prior or direct restraint on constitutionally protected rights.

Utah Code Section 77-23-204(1) provides, in relevant part, that:

- (1) All evidence to be considered by a magistrate in the issuance of a search warrant shall be given on oath and either reduced to writing or recorded verbatim. Transcription of the recorded testimony need not precede the issuance of the warrant. Any person having standing to contest the search may request and shall be provided with a transcription of the recorded testimony in support of the application of the warrant.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Mr. Mitchell appeals his conviction following a jury trial of Possession of a Controlled Substance with Intent to Distribute, in violation of Section 58-37-8-(1)(a)(iii) U.C.A., a Third Degree Felony; Tax Stamp Violation, in violation of Section 59-19-106(2) U.C.A., a Third Degree Felony; and Possession or Use of a Controlled Substance, in violation of 58-37-8-(2)(a)(i) U.C.A., a Class B Misdemeanor.

Defendant also forfeited any interest he had in cash and the vehicle seized at the time of his arrest.

Defendant does not allege any irregularities at his trial but appeals the denial of his Motion to Suppress.

B. COURSE OF PROCEEDINGS.

Mr. Mitchell was charged in a three count Information filed on March 15, 2000 (R-1). The original Information, which contained only the first three referenced criminal charges, was replaced by an Amended Information filed on March 20th, 2000 (R-7). The Amended Information charges the same three offenses and added a count for the forfeiture of the cash and another for the forfeiture of the vehicle. After preliminary hearing on March 20, 2000 Defendant was bound over on all charges.

Defendant filed a Motion to Suppress on May 18th, 2000 (R-24), alleging both that the traffic stop of his vehicle was illegal as was the subsequent search of his vehicle after a hearing on the Motion before the Honorable Lyle Anderson, Judge, on July 6th, 2000, Defendant's Motion was denied.

After a Jury trial on March 30th, 2001 the Defendant was found guilty of all charges. Defendant was sentenced on May 14th, 2001.

C. DISPOSITION IN THE COURT BELOW.

At sentencing on May 14th, 2001. Judge Anderson ordered the Defendant to serve two terms in the Utah State Prison not to exceed five years each, to be served concurrently. He was ordered to pay a fine of \$1,850.00 and restitution for recoupment of \$250.00. The prison sentence was stayed and Defendant was placed on 24-month probation. He was ordered to serve 150 days in the San Juan County Jail as a condition of probation.

D. STATEMENT OF FACTS.

This action arises from a contact between Trooper Rick Eldredge of the Utah Highway Patrol and Mr. Mitchell on March 14, 2000 (TR-3). (Referenced denoted "TR" cite the transcript of the Suppression Hearing.) Trooper Eldredge was on patrol, stationary on State Route 191 (TR-4). His car window was rolled down (TR-4). What drew the Troopers attention to the vehicle was that as it passed he heard loud "clicky" noises (TR-4). The Trooper believes the noise could possibly be a mechanical or equipment problem and pursued Mr. Mitchell's vehicle. He caught up to the vehicle and paced alongside it for a while and continued to hear the "clicky" sound. Although there was no traffic violation, he stopped Mr. Mitchell's vehicle (TR-4).

The Trooper requested the driver's license, registration and insurance (TR-5). He felt there were inconsistencies in Mr. Mitchell's story and other drug indications. He smelled air freshener, observed the rear windows were rolled down one or two inches, saw a handicapped permit hanging from the rear view mirror, and saw a Christian Broadcasting Radio sticker (TR-5).

The vehicle was registered to a woman in Omaha, Nebraska (TR-6). Mr. Mitchell could not provide her phone number (TR-7). Mr. Mitchell appeared nervous and was perspiring (TR-6). Mr. Mitchell stated the vehicle belonged to his girlfriend and that it had broken down in Phoenix while she was visiting with a

girlfriend. They flew home and Mr. Mitchell flew to Phoenix to repair and return the vehicle (TR-7).

Trooper Eldredge gave Mr. Mitchell all of his forms back and advised him he was free to go. As Mr. Mitchell started walking back to his car, Trooper Eldredge asked him if he was responsible for everything in the car and asked for permission to search (TR-9, 10). Mr. Mitchell asked if he had to allow the search and stated, "If I don't let you search, you'll just go ahead and search anyway." (TR-10).

After three or four minutes of conversation Mr. Mitchell signed a consent to search waiver (TR-10, 22).

SUMMARY OF ARGUMENT

I. Trooper Eldredge stopping of Mr. Mitchell's vehicle was clearly a subterfuge. Mr. Mitchell had not committed any traffic violations warranting the seizure of his person or vehicle. The trial court committed reversible error in concluding Mr. Mitchell's seizure was lawful.

Even if the initial stop was justified at its inception, Mr. Mitchell was unreasonably detained after the Trooper discovered there was no problem such that he would not let Mr. Mitchell go with a warning. While Mr. Mitchell eventually consented to the search, he did so in the course of an illegal seizure.

Therefore his consent is invalid, and the subsequent search illegal. All evidence obtained from the search must be suppressed.

ARGUMENT

Point I: Mr. Mitchell had not committed a traffic violation and the Troopers decision to stop his vehicle was not based on a reasonable suspicion.

To analyze the first prong of Defendant's denial of Fourth Amendment challenge, this Court must determine whether a traffic violation occurred in the presence of the officer. If there was a violation, the stop is justified. If not, this court must determine whether the officer had articulable suspicion for the stop. State v. Spurgeon, 904 P. 2d 220, 224 (Utah Ct. App. 1995).

In the instant case, Trooper Eldredge testified the sole reason for stopping Mr. Mitchell was a "clicky" noise (TR-4). Because there was no traffic violation, there was no reason for the stop and the trial court's determination to deny suppression must be reversed. See State v. Lopez, 873 P. 2d 1127, 1134 (Utah 1994). (If no traffic violation, stop not justified at inception and evidence must be suppressed.)

Defendant conjectures that Trooper Eldredge real motive in stopping his vehicle was based on observations that he made when he first observed the vehicle and that the later testified were suspicious. These indicators were the handicapped sticker and the Christian Radio Sticker. Perhaps the officer also noticed the out of

state plates. While there is no bright line test for determining the reasonableness of the officers suspicions, he must be able to “point to specific, articulable facts which, together with rational inferences drawn from these facts, would lead a reasonable person to conclude [Defendant] had committed or was about to commit a crime.” State v. Trujillo, 739 P. 2d 85, 88 (Utah Ct. App 1987). In determining whether the police had a reasonable suspicion to stop a motorist, this Court “looks to the totality of the circumstances present at the time the officers decided to stop the vehicle.” State v. Bello, 871 P. 2d 584, (Utah App 1994).

In the instant case no traffic violations, articulable or reasonable suspicion justifies the stop and the results must be suppressed.

Point II: Unreasonable or Unlawful Detainer of Mr. Mitchell exceeded the scope of the stop and void the subsequent search.

Even if, arguable, the initial stop was valid, this court must next consider the detention and determine “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

Once a traffic stop is made, the detention “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983). Both the “length and [the] scope of the detention must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” State v. Johnson, 805 P. 2d 761, 763 (Utah 1991)(quoting Terry, 392 U.S. at 19-20). This means that an officer conducting a routine traffic stop may request a driver’s license and vehicle registration, conduct a computer check, and issue a citation. However, once the driver has produces a valid drivers

license and evidence of entitlement to use the vehicle, “he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning.” State v. Robinson, 797 P. 2d 431, 435 (Utah Ct. App. 1990)(quoting United States v. Guzman, 864 F. 2d 1512, 1519 (10th Cir. 1988)). Investigative questioning that further detains the driver must be supported by reasonable suspicion of the more serious criminal activity. Reasonable suspicion means suspicion based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time of the stop. See State v. Mendoza, 748 P. 2d 181, 183 (Utah 1987); State v. Munsen, 821 P. 2d 13, 15 (Utah Ct. App. 1991); Robinson, 797 P. 2d at 435. If reasonable suspicion of more serious criminal activity does arise, the scope of the stop is still limited. The officers must “diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain the defendant.” State v. Grovier, 808 P. 2d 133, (Utah Ct. App. 1991) (quoting United States v. Sharpe, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 105 S. CT. 1568 (1985)).

Lopez, Supra at 1132.

In this case, Trooper Eldredge made the traffic stop to educate Mr. Mitchell about the “clicky” sound. Rather than efficiently complete this illegal stop, Trooper Eldredge compounded the Fourth Amendment violation by asking Mr. Mitchell numerous unrelated questions he had not business asking, see Lopez.

At the time he concluded his questioning and made his observations, Trooper Eldredge had no reasonable suspicion of any offense committed by Mr. Mitchell but just a hunch that something was amiss. Mere hunches, however, do not justify extended detentions.

In determining whether the detention is appropriate the inquiry is “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.” United States v. Harris, 928 F. 2d 1113, 1117

(11th Cir. 1991). “Once a traffic stop is made the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Lopez, supra, “Any further questioning or detentions on the part of the police, absent articulable suspicion of other criminal activity is illegal. United States v. Guzman, 864 F. 2d 1152 (10th Cir. 1988). See also State v. Godina-Luna, 826, P. 2d 652, 655 (Utah Ct. App. 1992).

Quite simply, nothing Trooper Eldredge testified to creates an articulable suspicion or reason to extended the stop. See State v. Hansen, 17 P. 3d 1135 (Utah App. 2000), in which the Court of Appeals reversed a drug possession conviction on the basis of an unlawfully extended traffic stop.

Finally, this Court must assess whether the government can meet its burden of proof that Mr. Mitchell’s consent was voluntary and not the product of the unlawful stop and detention. State v. Thurman, 846 P. 2d 1256, 1262 (Utah 1993).

The government bears a particularly heavy burden in seeking to establish consent following a preceding illegality. See Brown v. Illinois, 422 U.S. 590, 693-04 (1975). In assessing the government’s proof on this issue, the Court should consider “the totality of the circumstances surrounding the defendant’s consent, focusing on the temporal proximity of the illegal detention and the consent, any intervening circumstances, and particularly, the purpose and flagrancy of the officer’s unlawful conduct.” United States v. Walker, 933 F. 2d 812, 818 (10th Cir.), cert denied, 502 U.S. 1093 (1992). Whether the officer informs the suspects of their rights to refuse consent or to leave are significant

factors in the equation. United States v. Fernandez, 18 F. 3d 874m 882 (10th Cir. 1994). Where only minutes pass between the illegal police activity and the purported consent, and where there are no intervening circumstance, a finding of voluntary consent is generally not appropriate. See id. At 883. See also United States v. McSwain, 29 F. 3d 558, 562 (10th Cir. 1994)(government must prove both that consent was voluntary, and that there was a break in the events between the consent and the preceding illegality; finding that failure to inform defendant of rights to leave and rights to refuse consent point to involuntary consent).

As the Hansen court explained further,

“[A] defendant’s consent to a search following illegal police activity is valid under the Fourth Amendment only if both of the following tests are met: (i) The consent was given voluntarily, and (ii) the consent was not obtained by police exploitation of the prior illegality.” State v. Thurman, 846 P. 2d 1256, 1262 (Utah 1993); see also State v. Arroyo, 796 P. 2d 684, 688 (Utah 1990). “It is the State’s burden to prove that a consent was voluntarily given...If the State fails to meet this burden, the evidence is deemed inadmissible against the defendant.” Ham, 910 P. 2d at 439; accord Thurman, 846 P. 2d at 1263; State v. Robinson, 797 P. 2d 431, 437 (Utah Ct. App. 1990). This court has adopted the following analytical framework to determine whether the State has met its burden of proving that consent was voluntarily given:

(1) There must be clear and positive testimony that the consent was “unequivocal and specific” and “freely and intelligently given”;(2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, we] indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.’ Ham, 910 P. 2d at 439 (citations omitted)(alterations in original). In determining whether consent was voluntarily given we will look to the “totality of all circumstances.” Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854 (1973); accord Ham, P. 2d at 439.

Hansen, 17 P. 3d 1135 (UT App. 2000)

Assuming that the stop was lawful both its inception and scope, the State still has the burden to prove that Mr. Mitchell's consent to the search was voluntary, a task that cannot be made on this record, which reflects that Mr. Mitchell simply acceded to Trooper Eldredge's clear intention to search the car. See e.g. Florida v. Royer, 460 U.S. 491, 497 (1983), "Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of unlawful authority."

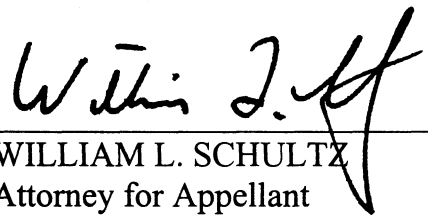
CONCLUSION

While Mr. Mitchell answers to some of Trooper Eldredge's questions may have been strange or inconsistent, Trooper Eldredge should have been asking the questions in the first place. Even if Trooper Eldredge was justified in asking the questions, the answers did not give rise to a reasonable suspicion of further criminal activity. The original stop was illegal, but even if this Court holds otherwise, the original purpose of the stop, to advise Mr. Mitchell of the unusual noise, could have been quickly resolved without unnecessary detention or questioning.

Because Mr. Mitchell was unlawfully detained when he consented to a search of a vehicle, his consent is invalid.

Based on the foregoing, Mr. Mitchell respectfully requests the Court of Appeals to reverse the trial courts ruling denying his Motion to Suppress.

DATED this 6th day of November 2001.



WILLIAM L. SCHULTZ
Attorney for Appellant

ADDENDUM

“A”

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Bill Schultz

SEVENTH JUDICIAL DISTRICT COURT
San Juan County
FILED MAY 12 2017
CLERK OF THE COURT
DEP

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

MICHAEL EUGENE MITCHELL

Defendant.

**JUDGMENT AND ORDER
OF PROBATION**

COURT CASE NO: 0017-21

JUDGE: Lyle R. Anderson

APPEARANCES:

Craig C. Halls, Attorney for Plaintiff, State of Utah

William L. Schultz, counsel for Defendant.

No legal reason having been shown why Judgment should not be pronounced, the Defendant waiving the time period before sentencing and having voluntarily and with knowledge of the consequences thereof, having been found guilty by a jury to the charge(s) of:

Count 1: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a third degree felony

Count 2: TAX STAMP VIOLATION, a third degree felony

Count 3: POSSESSION OR USE OF A CONTROLLED SUBSTANCE, a class B misdemeanor

Count 4: FORFEITURE DEMAND, \$550.00 currency

Count 5: FORFEITURE DEMAND, a Silver Fleetwood Cadallic,

IT IS THE JUDGMENT OF THIS COURT, as follows:

That the Defendant be imprisoned in the Utah State Prison a term not to exceed FIVE YEARS each on Counts 1 and 2, to be served concurrently. Pay a fine in the amount of \$1850.00 and restitution of \$250.00 for recoupment fees, the prison sentence is stayed and Defendant is placed on informal probation for 24 MONTHS upon the following conditions:

1. That the Defendant pay the fine, fees and restitution at the rate of \$100.00 per month, the first payment to be made within 30 days after his release from jail. Payments are to be made by check or money order payable to and mailed to: SEVENTH DISTRICT COURT, BOX 68, MONTICELLO, UT. 84535.

2. That the Defendant violate no law, either Federal, State or Municipal.

3. Defendant shall contact the Court if he cannot pay the payments as scheduled.

4. Defendant shall serve 150 days in the San Juan County Jail.

5. Defendant shall pay restitution of \$250.00 for attorney recoupment fees.

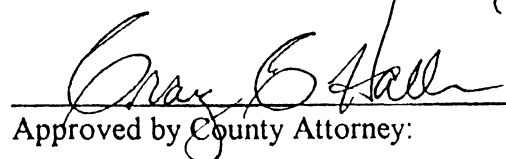
6. Defendant shall pay the fines, assessment fees and restitution in full before his probation is terminated.

7. Defendant shall forfeit any interest he might have in the Silver Fleetwood Cadallic, VIN # 1GCD6981G4228558.

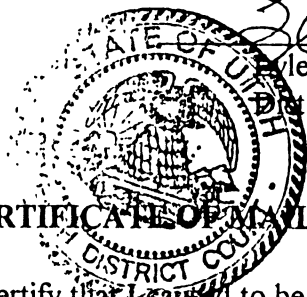
8. Defendant shall forfeit the U.S. Currency in the sum of \$550.00 to San Juan County.

The Court retains jurisdiction to make such other and further orders as it may deem necessary from time to time.

DATED this 15th day of May, 2006.


Approved by County Attorney:

DATED this 15th day of May, 2001.



Steve R. Anderson
District Court Judge

CERTIFICATE OF MAILING/HAND DELIVERY

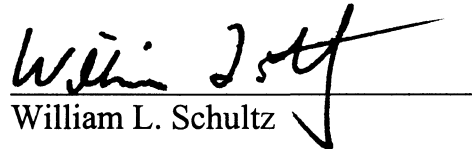
I hereby certify that I caused to be mailed, postage prepaid, or hand delivered a copy of the foregoing JUDGMENT AND ORDER OF PROBATION to William L. Schultz, Attorney for Defendant, at P.O. Box 937, Moab, UT 84532.

DATED this 17th day of May, 2001.

Margo Yuhas
clerk

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Opening Brief of Appellant to Mark L. Shurtleff, Attorney General, 160 E. 300 South, Heber Wells Bldg., Salt Lake City, Utah 84114, postage prepaid, this 6th day of November 2001.


William L. Schultz